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Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Petitions for Writs of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, *et al.*,* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 24 (Seventh) of the National Bank Act, granting to national banks "all such incidental powers as shall be necessary to carry on the business of banking," is broad enough to encompass the sale of annuities, as agent, by national banks to customers.

2. Whether the court correctly construed Section 92 of the National Bank Act as a limitation on the incidental powers of national banks as determined by the Comptroller, notwithstanding that it expressly confers on national banks in small towns insurance agency powers that are "<u>in addition to</u> the powers now vested by law in national banking associations."

3. Whether the statutorily undefined word "insurance," as it appears in Section 92 of the National Bank Act, necessarily includes annuities where the Comptroller of the Currency, charged with the administration of that section of the law, has determined otherwise.

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IN SUPPORT OF PETITIONERS

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with Supreme Court Rule 37.2. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association, Bankers Roundtable, Association of Banks in Insurance, and Consumer Bankers Association are national trade associations of the commercial banking industry. Most commercial banks in the United States, their employees, their holding companies, and even some insurance companies that market their products through banks are members of one or more of the associations. All the associations represent the interests of both national banks and state-chartered banks in legislatures, regulatory agencies and courts on issues that are of widespread importance to the industry.

The New York State and Louisiana Bankers Associations are the principal trade associations for the banking industry within their respective states. While this case has great importance to banks in all states, banks in these states have interests in the case that are unique.

In Louisiana, a state statute expressly ties the authority of state-chartered banks to sell annuities to the outcome of this case--and does so by name. La. R.S. 6:242 (A)(16). The authority of state-chartered banks to engage in some fashion in the insurance agency business is likewise dependent--at least in large part--upon the ability of national banks to do so under Sections 24 (Seventh) and 92 of the National Bank Act. The matter has been in litigation for four years with no resolution yet in sight. (*See American*

Bank & Trust Co. of Opelousas v. Drake, No. 93-5040 (5th Cir. 1994)(unpublished)). Finally, soon after (and as a direct result of) the decision below, the Insurance Commissioner of Louisiana began an inquiry into the insurance and annuities sales activities of all national banks in the state, clearly with a view toward moving to prevent those activities.

In New York, the Court of Appeals recently upheld the right of state-chartered banks to sell annuities. The decision of the Fifth Circuit thus threatens to upset the delicate and historic balance between the powers of state and federally-chartered banks in New York, the largest banking market in the country. It casts a cloud over the power of national banks in New York, including some of the largest banking organizations in the United States, to sell annuities, at the same time that their State-chartered brethren (also some of the nation's largest banking organizations) now are free to do so without limitation. This result is all the more anomalous because the two governing statutes are identical for this purpose, and indeed the state law served as the model for the National Bank Act.[1] Rules of statutory construction provide that what a predecessor statute means is instructive of what an adopting statute means as well.[2]

Even more significant, the continuing vitality of the national bank charter, in New York and other states, is in question if the decision below stands. The Fifth Circuit's narrow construction of the National Bank Act's "incidental

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[1] Symons, The "Business of Banking" in Historical Perspective, 51 Geo. Wash. L.Rev. 676, 689 (1983).

[2] *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 308 (1898).

powers" clause stands in stark contrast to the progressive, forward-looking reading of the identical language under New York law by the New York Court of Appeals--a difference that cannot fail to be noted by national banks in the highly competitive New York market. Indeed, within the past year at least three New York institutions have surrendered their national charters in favor of a state charter.

The NYSBA participated actively in *New York State Association of Life Underwriters v. New York State Banking Department*, 83 N.Y.2d 353 (NY 1994). Indeed, the litigation arose directly from a NYSBA initiative. The NYSBA thus is uniquely well situated to elucidate the issues decided by *NYSALU* and their relevance to this case.

REASONS FOR GRANTING THE WRIT

It is critical for the Court to review the decision of the Fifth Circuit below for three reasons: The decision is inconsistent with other U.S. Courts of Appeals in several different respects, creating conflicts that need to be resolved; the Fifth Circuit has acted inconsistently with this Court's decision in *Securities & Exchange Commission v. Variable Annuity Life Insurance Company*; and the decision could have serious economic consequences to the banking industry and the public.

I. The Conflicts Among the Circuits

A. Incidental Powers

The National Bank Act, now 130 years old, grants to national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." The test for what constitutes "the business of

banking" or ascertaining what powers are "incidental" to that business is perhaps the most critical issue imaginable for the banking industry. It will, in large measure, determine whether a multi-billion dollar industry will be able to adapt to new, rapidly and constantly changing economic realities or will stagnate and ultimately wither away.

In the case below, the Fifth Circuit has opted for stagnation. The test it adopts for assessing the validity of a proposed "incidental" power is especially parsimonious:

> Even conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed "necessary."

Variable Annuity Life Insurance Company v. Clarke, 998 F.2d 1295, 1302 (5th Cir. 1993) (hereinafter "*VALIC*").

Only if the word "necessary" means "absolutely essential" or "indispensable" does the quoted sentence make any sense at all. But that is not what the word means. As this Court has often held, construing the same word in Article I, Section 8, clause 18 of the Constitution, the word "necessary" includes all appropriate means which are conducive or adapted to the end to be accomplished. *Legal Tender Case*, 110 U.S. 421, 440 (1884). *See also Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 473 (1894); *Legal Tender Cases*, 79 U.S. 457, 534 (1871); *M'Culloch v. Maryland*, 17 U.S. 316, 413-15 (1819). It is no stretch of the imagination to think that the sale of annuities by national banks is "necessary" as so understood.

Other circuits have rejected the "necessary" test here imposed by the Fifth Circuit. In *M&M Leasing Corp. v.*

Seattle First National Bank, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the Ninth Circuit held that the National Bank Act "did not freeze the practices of national banks in their nineteenth century forms.... [T]he powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." That case involved lease financing of automobiles, an activity that was not within the contemplation of Congress when the National Bank Act was enacted in 1864. In addition, since many banks have been known to conduct their businesses successfully without engaging in the business of lease financing, the business would hardly seem to be "necessary" as the Fifth Circuit understands that word. Nevertheless, the Ninth Circuit upheld the ability of the banks to engage in the lease financing business as a proper exercise of their "incidental" powers. *See also American Insurance Association v. Clarke*, 865 F.2d 278, 281-282 (D.C. Cir. 1988) and *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 778 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990).

The First Circuit has a different test for examining what is or is not an incidental power of national banks. According to that court, an activity of a national bank is authorized as an incidental power "if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972). It is no stretch of the imagination to think that the sale of annuities by a national bank is convenient and useful, and connected to performance of the express powers granted to the national bank to purchase and sell securities "without recourse, solely upon the order, and for the account of, customers, and in no case

for its own account." 12 U.S.C. § 24 (Seventh).[3]

In short, the decision of the Fifth Circuit, with respect to the matter of construing the "incidental powers" clause of the National Bank Act is incompatible with the decisions of the Ninth, District of Columbia, Eighth and First Circuits on the same matter. The Fifth Circuit's "necessary" test is not limited to the question of whether the sales of annuities fits within the "incidental powers" clause of the statute. Rather, the test will--if unreviewed and unreversed--be broadly applied in future and could be interposed as a bar to all manner of activities of national banks that are not absolutely indispensable to banking but which are, nonetheless, logical, reasonable accommodations to a financial world greatly different from the world of 1864, or to a future financial world greatly different even from today. Meanwhile, national banks in other circuits will be governed by different and more practical rules. In fact, as interstate banking becomes more prominent, the same banking institution can find itself subject to conflicting rulings. This case demonstrates that point quite graphically. NationsBank is headquartered in North Carolina, within the Fourth Circuit, yet finds its activities limited by a decision of the Fifth Circuit. Court should grant the petitions in order to restore a uniformity in the interpretation of this critical grant of authority to national banks.

B. Scope of Section 92

Section 92 of the National Bank Act, 12 U.S.C. § 92,

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[3] This Court, of course, has held that variable rate annuities are securities. *Securities and Exchange Commission v. Variable Annuity Life Insurance Company*, 359 U.S. 65, 67-68 (1959).

provides in relevant part that "[i]n addition to the powers now vested by law in national banking associations...any such association located and doing business in any place the population of which does not exceed five thousand inhabitants ....may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company...."

Last term, this Court held that Section 92 continues to exist, notwithstanding an apparent scrivener's error. *U.S. National Bank v. Independent Insurance Agents of America*, 113 S. Ct. 2173 (1993). Left open, now that the question of Section 92's existence is resolved, is the question of what it means. That is an especially important question of federal law since Section 92's meaning is at issue in pending litigation all over the country. *See, for example*, *Barnett Bank of Marion County v. Gallagher*, 839 F. Supp. 835 (M.D. Fla. 1993), *appeal pending*, 11th Cir. No. 93-3508; *Owensboro National Bank v. Stephens*, 803 F. Supp. 24 (E.D. Ky. 1992), *appeal pending*, 6th Cir. Nos. 92-6330, 92-6331; *Shawmut Bank Connecticut, N.A. Googins*, No. 3:94 CV 146 (JAC)(D. Conn., filed February 1, 1994); *First Advantage Insurance v. Green*, No. 365352 (Louisiana 19th Jud. Dist. Ct., November 18, 1993), *appeal pending*, La.App. 1st Cir. No. 94/CA/0813.

The Petitions in these cases both correctly point out that there is a conflict in the circuits over the scope of Section 92. The Fifth Circuit's decision below holds, by negative inference, that Section 92 is a limitation upon the powers of national banks in larger cities to sell insurance: "Section 92 explicitly authorizes national banks in towns with a population smaller than 5,000 to act as insurance agents, and impliedly prohibits national banks in towns with a population larger than 5,000 from acting as insurance

agents." *VALIC* at 998 F.2d 1298. The Second Circuit has reached a similar conclusion in *American Land Title Association v. Clarke*, 968 F.2d 150 (2d Cir.), *cert. denied*, 113 S. Ct. 2959 (1993). On the other hand, the District of Columbia Circuit (*Independent Bankers Association of America v. Heimann*, 613 F.2d 1164, 1169-70 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980)) and the Eighth Circuit (*Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n. 6 (8th Cir. 1984) have concluded that Section 92, which by its own terms is an **additional** grant of power, has nothing to do with the powers that may or may not be exercised by national banks in larger towns.

Both the District of Columbia and Eighth circuits have subsequently followed the precedents set in their respective cases in a manner that does not admit of the characterization of their opinions as "dicta." In *American Insurance Association v. Clarke*, *supra*, 865 F.2d 278, the court found that sale of municipal bond assurance (though undoubtedly "insurance") by a national bank through a subsidiary was a proper exercise of the bank's incidental powers. It did not matter that the bank in question, Citibank, N.A., was located in New York City, a place with more than 5,000 inhabitants. Similarly, in *First National Bank of Eastern Arkansas v. Taylor*, *supra*, 907 F.2d 775, the court determined that the sale of "debt cancellation contracts" by a national bank was incidental to banking. This was so notwithstanding the Arkansas Insurance Commissioner's holding that the contracts were "insurance" subject to his regulation, and notwithstanding the fact that the bank was (and is) located in Forrest City, Arkansas,

population 13,364.[4]

i. The Special *Chevron* Problem

Both petitions for writs of certiorari in these cases rely heavily upon what they perceive to be the Fifth Circuit's failure to follow this Court's directive in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In this respect, we note yet another conflict between Circuits created by the Fifth Circuit below.

Chevron crafted a two-part test: "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress....[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." 467 U.S. at 842-43.

The Fifth Circuit pays lip service to *Chevron*. It concludes that the intent of Congress is "clear" in this case from the plain language of Section 92 and from its legislative history. *VALIC*, 998 F.2d at 1300. That being so, the court purports to give effect to that legislative intent and does not reach the second part of the *Chevron* test.

The District of Columbia Circuit, on the other hand, has an entirely different and incompatible view of Section 92. After this Court's decision in *U.S. National Bank*, *supra*, the case was remanded to the District of Columbia Circuit to resolve an interpretive matter regarding Section 92 that it had left unresolved prior to this Court's consideration

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[4] Polk Financial Institutions Directory, Spring 1993 (Arkansas) p. 14.

of the case. That case, like this one, involved a national bank headquartered in a large city; that case involved the efforts of the bank to sell insurance generally (from a small-town branch), and this case involves the efforts of the bank to sell annuities (which the Fifth Circuit has held--incorrectly--to be "insurance"); that case, like this one, involved the efforts of the bank to sell the product to customers who were not necessarily residents of small towns; that case, like this one, involved approval by the Comptroller of the Currency of the bank's activities; that case, like this one, involved allegations by the insurance industry that the proposed activities were impliedly prohibited by Section 92 of the National Bank Act.

Nevertheless, the District of Columbia Circuit, looking at **exactly** the same statute and **exactly** the same legislative history as the Fifth Circuit, concluded that the law was anything but clear and unambiguous:

> [T]he words and structure do not reflect an unambiguous intent on the issue....[W]e find nothing in th[e] history to suggest an unambiguous congressional intent on the precise question at issue. Furthermore, it is not our job to divine how legislators would have responded to hypotheticals...particularly where the question is as unknowable as the reaction of 1916 legislators to a world of microchips, communications satellites, fax machines, direct mail and telephone solicitation, and all of the other technologies and techniques that now enable a nationwide business to be conducted from any hamlet.

Independent Insurance Agents of America v. Ludwig, 997

F.2d 958, 960-961 (D.C. Cir. 1993) (citation omitted).

Having found a lack of clarity in Section 92, its language, structure and legislative history, the District of Columbia Circuit did what the Fifth Circuit refused to do; it moved on to the second part of the *Chevron* test and, under it, readily upheld the interpretation of the Comptroller.

In short, both the Fifth and the District of Columbia Circuits purport to follow the *Chevron* doctrine. But there is a clear conflict between them in how the doctrine is to be applied in the context of interpreting Section 92 of the National Bank Act. The District of Columbia Circuit is willing to accept the fact that the world has changed since 1916 to such a degree that it is no longer possible to say that the legislators of that era have spoken directly to today's problems. The Fifth Circuit is not willing to do so, imputing to 1916 legislators an "intent," for example, to have "annuities" included within the meaning of "insurance" when there is no evidence that Congress ever even thought about the matter.[5] Did the 1916 Congress address--specifically--what "insurance" activities national banks could engage in outside the boundaries of small towns? The Fifth Circuit below says "yes"; the District of Columbia Circuit says "no." This Court should resolve the conflict.

C. Annuities as "Insurance"

In our view, it should not much matter whether annuities are deemed to be "insurance" products for purposes

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[5] This is an especially great leap of logic with respect to variable annuities since the first such instrument apparently did not come upon the scene until 1952--thirty-six years later. *See SEC v. VALIC*, 359 U.S. at 69.

of this case or not. The critical question is whether or not the sale as agent of annuities fits within the "business of banking" or is one of the powers incidental thereto. If such sales are authorized under Section 24 (Seventh) of the National Bank Act, then those sales may be conducted by all national banks, regardless of their location, unless the power is taken away specifically by some other federal statute. As we suggest above, and as the District of Columbia and Eighth Circuits have held, Section 92 of the National Bank Act does not take away from national banks in large towns the capacity to do that which is incidental to banking even if the incidental power in question involves or might be deemed to involve the sale of insurance as agent.

Only if Section 92 is held to be a limitation on incidental "insurance" powers of large-town national banks (which it is not) does the issue of whether a particular product is "insurance" even arise.

The Fifth Circuit below wrongly concluded that Section 92 is a limitation, and then wrongly concluded again that annuities are "insurance." It reached the second conclusion by a manifestly flawed analysis that is inconsistent with precedents, not only of other U.S. Courts of Appeals, but also of highly relevant state court decisions, and even of other panels of the Fifth Circuit itself.

Most egregious of all, however, the Fifth Circuit decision below flies in the face of this Court's decision--which the Fifth Circuit cites but then flagrantly ignores--in a case involving the very same "insurance company" that is a party to this case.

In *Securities & Exchange Commission v. Variable Annuity Life Insurance Company*, 359 U.S. 65 (1959), as in

this case, the relevant federal statute used, but did not define, the word "insurance." In that case, as in this one, the relevant statute granted broad rule-making authority to a federal regulatory agency to administer the statute. In that case, as in this one, the Variable Annuity Life Insurance Company claimed that variable annuities were "insurance" products within the meaning of the applicable federal statute, while the regulatory agency charged with administration of the statute contended that they were not. In that case, as in this one, the best proof offered that annuities were insurance was the unremarkable fact that they were regulated as such under the insurance laws of all the states. (*Compare SEC v. VALIC*, 359 U.S. at 67, with *VALIC*, 998 F.2d at 1300).

In that case, however, this Court declined the opportunity to give binding effect to state insurance law characterizations of annuities: "In any event how the States may have ruled is not decisive. For, as we have said, the meaning of 'insurance' or 'annuity' under these Federal Acts is a federal question." *SEC v. VALIC*, 359 U.S. at 69.

On this key point, the Fifth Circuit departed from this Court's analysis. The fatal flaw in the decision below is the refusal to accept the basic proposition that the answer to the question of what a particular word means often depends on why the question was asked. Thus, for example, this Court had no trouble holding that an institution chartered as a bank and insured and regulated as such by the Federal Deposit Insurance Corporation was, nevertheless, not a bank for purposes of the Bank Holding Company Act. *Board of Governors of the Federal Reserve System v. Dimension*

Financial Corp., 474 U.S. 361 (1986).[6]

With respect to the meaning of the word "insurance" for federal banking law purposes, the Comptroller of the Currency determined that "debt cancellation contracts" did **not** fit within that category, and therefore could be offered by national banks as an exercise of "incidental powers," despite the protestations of the Arkansas Insurance Commissioner that such contracts were the functional equivalent of credit life insurance policies and were therefore subject to his jurisdiction. The Eighth Circuit agreed with the Comptroller: "**Because** debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute ' the business of insurance' under the McCarran-Ferguson Act." *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d at 779. This is not to say that the Commissioner's interpretation of Arkansas insurance law was wrong (any more than other state treatment of "annuities" as insurance in the *SEC v. VALIC* case was "wrong"), only that the state insurance laws were not at issue in that case. The National Bank Act was at issue--just as in this case. When the

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[6] *See also First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969)(facility is a "branch" under McFadden Act, though not a "branch" under state law.), *FDIC v. Philadelphia Gear*, 476 U.S. 426 (1986)(promissory note under Oklahoma Commercial Code is not a promissory note for purposes of Federal Deposit Insurance Act) and, ironically, the Fifth Circuit's own decision in *Department of Banking v. Clarke*, 809 F.2d 266 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (state chartered savings and loan association was a "bank" for purposes of the federal McFadden Act, even though it would never have been classed as such by the state law under which it existed).

application of state insurance laws to debt cancellation contracts was at issue, the Arkansas Supreme Court held that those contracts **did** fit within the state law definition. *Douglas v. Dynamic Enterprises*, 315 Ark. 575, 869 S.W.2d 14 (Ark. 1994). The court acknowledged the earlier decision of the Eighth Circuit, and did not disagree with it. It merely held that the Circuit decision was of limited applicability because it "involves a federal activity and a matter of federal law." *Id.*, 869 S.W.2d at 17.

That is precisely the point here. Words mean different things in different contexts. It does not matter, for example, if "annuities" are insurance products for purposes of the Internal Revenue Code (which by specific statutory definition provides that an insurance company is a company that issues life insurance **and** annuity contracts.[7] 26 U.S.C. § 816(a)). In the absence of a specific statutory definition in the federal banking laws, there is no reason necessarily to conclude that annuities are insurance products for purposes of those laws as well.

Another recent example of this point is New York Court of Appeals decision in *New York State Association of Life Underwriters v. New York State Department of Banking*, 83 N.Y.2d 353 (N.Y. 1994). New York is one of the states mentioned by the court below as regulating annuities as insurance products for purposes of the state insurance laws. *See* N.Y. Ins. Law § 1113(a)(2) (McKinney 1990). That fact did not dissuade New York's highest court from holding that annuities are **not** an insurance product for purposes of

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[7] The use of the conjunctive suggests that, for purposes of the Code, annuities are something different from and in addition to life insurance. *See, e.g., Areizaga v. Quern*, 442 F. Supp. 168, 173 (N.D. Ill. 1977).

the state's banking laws. The court's analysis was based extensively (as should be the case here) upon an evaluation of whether annuities fit within the incidental powers of banks. Having determined that the fit was good, the court went on to say that

> we reject the assertion that annuities are insurance which banks are not authorized to sell. To be sure, Insurance Law § 1113(2) includes "annuities" in its description of "kinds of insurance authorized." However, the great weight of authority supports the position that annuities are not insurance.

Id., *supra*, 83 N.Y.2d at ____ .

Finally, the Fifth Circuit itself deals differently with annuities depending upon context. In the case below, it was more than willing to hold that annuities are insurance for purposes of Section 92 of the National Bank Act. But simultaneously with the consideration of this case, a different panel of the court was resolving *In re Newman*, 993 F.2d 90 (5th Cir. 1993). There the court held that an annuity is a "general intangible" for purposes of the Texas Uniform Commercial Code. Without using the words, the panel necessarily held, therefore, that an annuity is **not** an insurance product. Under the Uniform Commercial Code, Section 9-104(7), insurance policies are not "general intangibles." *See VALIC v. Clarke*, 13 F.3d 833, 837 (Smith, J., dissenting).

In summary of this point, context matters. It matters to this Court, to other circuits, and to state appellate courts. It did not seem to matter to the panel of the Fifth Circuit that decided this case: If the Internal Revenue Code and state

insurance laws treat annuities as insurance, then annuities must be insurance, at all times, for all purposes, period.[8] Because the panel's opinion deviates so greatly from otherwise settled law in this respect, this Court should grant the petitions in this case to resolve the conflict.

II. The Importance of the Issue

Much of the discussion set forth above in the context of describing the conflicts between the Fifth Circuit panel's opinion and other courts' opinions dealing with related or even identical subjects also points up the importance of the legal issues in this case. The matter is likewise of great practical economic consequence as well. Both of the

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[8] To be fair, the panel also holds that annuities are "functionally" insurance products as well. *VALIC*, 998 F.2d at 1301. In so holding, the court has placed itself in conflict with this Court and numerous other courts--again including itself. *See Helvering v. LeGierse*, 312 U.S. 531, 542 (1941)(describing an annuitant's risk as an investment risk, not an insurance risk); *Corporation Commission v. Equitable Life*, 73 Ariz. 171, 239 P.2d 360, 363 (Ariz. 1951) (annuities are investments, not a risk based on contingency of loss); *Prudential Insurance Company v. Howell*, 29 N.J. 116, 148 A.2d 145, 148 (N.J. 1959)(life insurance and annuities are diametric opposites); *State ex rel. Equitable Life Assurance Society v. Ham*, 54 Wyo. 148, 88 P.2d 484, 488 (Wyo.1939) (purchase price of annuity is not a life insurance premium); *Daniel v. Life Insurance Company of Virginia*, 102 S.W.2d 256, 260 (Tex.Civ.App. 1937)(annuity is essentially a form of investment); *In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987)(same); *New York State Association of Life Underwriters v. New York State Department of Banking*, *supra*.

petitions for writs of certiorari describe in detail the fact that annuity sales are a large and burgeoning part of the business of banking. Banks have achieved a significant share of the annuities market in a comparatively short period of time, even in the face of delays and disincentives arising from judicial and administrative assaults by the competitor insurance industry and some state insurance commissioners. The ability of banks to move so swiftly into the market suggests quite clearly a previously unmet consumer need or a consumer preference for dealing with banks rather than insurance salesmen on financial matters. The Fifth Circuit decision, if unreviewed, will not only have the effect of depriving banks of a business that they perform well, but will also deprive consumers of the competitive marketplace choices they now seem to enjoy. Indeed, since VALIC does business in all fifty states, it has the capacity to challenge any national bank, anywhere, selling annuities, and to do so in the Fifth Circuit where the company is located.

The Fifth Circuit decision is harmful to robust competition in other respects as well. While the decision officially applies only to national banks approximately thirty-seven states have so-called "wild card" or "parity" statutes on their books. With variations, these statutes generally authorize state-chartered banks to exercise the same powers that may be exercised by national banks within the state, notwithstanding anything else in state banking laws.[9] In many states, therefore, a decision to the effect that national banks may not sell annuities is necessarily also a decision that state-chartered banks may not sell annuities, thus harming the business opportunities of those banks and their customers.

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[9] See Appendix to this brief for collection of citations.

Finally, there are those states that do allow annuity sales by their own state-chartered banks. As indicated above, New York is the most recent example. National banks in direct competition with such state-chartered banks as "full service" financial institutions will be at a decided disadvantage, to no good end.

Judge Smith's opinion, dissenting from the denial of suggestions for rehearing en banc in the court below, summarizes this point best when he writes that "[t]he panel's holding, moreover, seriously thwarts competition in a major market, with no indication that that is what Congress intended." *VALIC*, 13 F.3d 833, 834 (Smith, J., dissenting[10]). On those grounds alone, this Court should grant the petitions for writs of certiorari.

CONCLUSION

For all of the reasons above, your amici respectfully urge the Court to grant the Petitions.

Respectfully submitted,

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[10] Judge Smith's opinion expressed the view of four members of the court that the decision of the three-judge panel should have been reheard en banc. Only the large number of recusals prevented that from happening. *Id.*

APPENDIX

APPENDIX

Wild Card/Parity Statutes

Alaska	Sec. 06.01.020
Arizona	Sec. 6-184(2)
Arkansas	Sec. 23-32-701(16)
Colorado	Sec. 11-2-103
Florida	Sec. 655.061
Georgia	Sec. 7-1-61(a)(1)
Hawaii	Sec. 403-47.1
Idaho	Sec. 26-1101(3)
Illinois	205 ILCS 5/5(11)
Kansas	Sec. 9-1715
Kentucky	Sec. 287.020
Louisiana	Tit. 6, § 242(C), Revised Stat.
Maine	Tit. 9B, §416
Maryland	Sec. 5-504 of Fin. Inst. Art.
Minnesota	Sec. 48.15 (Subd. 2)
Mississippi	Sec. 81-5-1(10)
Missouri	Sec. 362.105(3)
Montana	Sec. 32-1-362
Nevada	Sec. 662.015(1)(f)
New Hampshire	Ch. 394-A:7
New Jersey	Sec. 17:9A-24a and 17:9A-25(12)
New Mexico	Sec. 58-1-54
North Dakota	Sec. 6-03-38
Ohio	Sec. 1125.23
Oklahoma	T.6, § 203
Oregon	Sec. 707.340

South Carolina	Sec. 34-1-110
South Dakota	Sec. 51A-2-14
Tennessee	Sec. 45-2-601
Texas	Sec. 342-113(a)(4) of Civil Statutes
Utah	Sec. 7-1-301(3)
Vermont	T.8, §1163
Virginia	Sec. 6.1-5.1
Washington	Sec. 30.04.215
West Virginia	Sec. 31A-3-2(a)(5)(B)
Wisconsin	Sec. 220.04(8)
Wyoming	Sec. 13-3-704